No. 13,016

IN THE

United States Court of Appeals

For the Ninth Circuit

THE CITY OF ANCHORAGE, a Municipal Corporation, Z. J. LOUSSAC, Mayor of the City of Anchorage, B. W. BOEKE, City Clerk-Treasurer of the City of Anchorage, ROBERT E. SHARP, City Manager of the City of Anchorage,

Appellants,

vs.

ARTHUR E. ASHLEY and VIRGINIA ASHLEY,

Appellees.

On Appeal from the District Court for the Territory of Alaska, Third Division.

BRIEF FOR APPELLEES.

GEORGE M. McLAUGHLIN,
Reed Building, Anchorage, Alaska,
Attorney for Appellees.

Subject Index

	Page
Jurisdiction	1
Statement of the case	2
Argument	3
Conclusion	27

Table of Authorities Cited

Cases

Pages

City of Moundsville v. Yost et al., 75 W.Va. 250, 83 S.E. 910 (1914) 22

Earle v. Holman (Sup. Ct. Oregon 1936), 61 P. (2d) 1242 9

In re Ketchikan Delinquent Tax Roll (1st Division, Ketchikan July 27, 1922), 6 Alaska 653.....7, 8, 20

In re Ketchikan Delinquent Tax Roll, City of Ketchikan v. Furnivall, 293 Fed. 577 (C.C.A. 9th 1923).....4, 6, 14

Schmidt et al. v. Village of Deer Park, 78 N.E. (2d) 72 (Ohio 1947) 20

Strout v. City of Portland, 26 Or. 294, 38 Pac. 126 (1894)..24, 27

Town of Ketchikan v. Zimmerman, 4 Alaska 336 (1911).. 27

United States v. Dollar, 100 F. Supp. 881 (D.C., N.D., Cal., S.D., 1951) 18

Vennum v. Village of Milford, 202 Ill. 423, 66 N.E. 1040 (1903) 16

Zalesky v. City of Cedar Rapids et al. (Supreme Court of Iowa, Dec. 17, 1902), 118 Iowa 714, 92 N.W. 657..... 14

Statutes

Act of February 13, 1925, Section 8-C, as amended, 28 U.S.C.A. 1294 (June 25, 1948, c. 646, 62 Stat. 930).... 2

Alaska Compiled Laws Annotated (1949):
Sections 16-1-81, 16-1-82 and 16-1-83 19
Sections 16-1-91, 16-1-92, 16-1-93, 16-1-94, 16-1-95 27
Section 56-2-2 2

Compiled Laws of Alaska (1933), Section 2466 (L. 1927, ch. 56, Sec. 6, p. 99) 27

Pages

Compiled Laws of the Territory of Alaska (1913), Section 627 ..... 7, 8

Judiciary and Judicial Procedure Act, Section 1291, Chapter 83, 28 U.S.C.A. (June 25, 1948, c. 646, 62 Stat. 930) 2

Session Laws of Alaska (1923):
Chapter 97, Section 64 ..... 8, 10
Chapter 97, Section 65 ..... 8, 10

Session Laws of Alaska (1951), Ch. 99 29

Texts

48 Am. Jur. p. 683 14

1 Cooley on Taxation 469 (3rd Ed.) 29

5 McQuillin's Municipal Corporations (3rd Ed.), pp. 16-19 11

14 McQuillin, Municipal Corporations (3rd Ed.):
Section 38.07, page 54 27
Section 38.08, page 60 13

16 McQuillin, Municipal Corporations (3rd Ed.), Section 44.13, page 42 29

Rules

Federal Rules of Civil Procedure, Rule 56..... 17

No. 13,016

IN THE

United States Court of Appeals

For the Ninth Circuit

THE CITY OF ANCHORAGE, a Municipal Corporation, Z. J. LOUSSAC, Mayor of the City of Anchorage, B. W. BOEKE, City Clerk-Treasurer of the City of Anchorage, ROBERT E. SHARP, City Manager of the City of Anchorage,

Appellants,

vs.

ARTHUR E. ASHLEY and VIRGINIA ASHLEY,

Appellees.

On Appeal from the District Court for the Territory of Alaska, Third Division.

BRIEF FOR APPELLEES.

JURISDICTION.

This is an appeal taken from a final judgment in favor of appellees filed and entered in the District Court for the Third Division, Territory of Alaska, on the 23rd day of March 1951. (R. 138.)

The District Court had jurisdiction in this proceeding by virtue of the provisions of Chapter 2, Alaska

Compiled Laws Annotated, 1949, entitled "Action by and Against Public Corporations and Officers," Section 56-2-2.

The Ninth Circuit Court of Appeals has jurisdiction of said appeal by virtue of the provisions of Section 1291 (Chapter 83) of the Judiciary and Judicial Procedure Act, 28 U.S.C.A. (June 25, 1948, c. 646, 62 Stat. 930). This appeal is governed by Section 8-C of the Act of February 13, 1925, as amended (28 U.S.C.A. 1294) June 25, 1948, c. 646, 62 Stat. 930.

STATEMENT OF THE CASE.

On July 1, 1949, appellant, The City of Anchorage, let a contract for the construction of certain sewer lines. (R. 62.) Substantial work was done on the sewer lines, and some were in operable condition (R. 21) when the appellant, by its City Council, on March 1, 1950, enacted its Resolution No. 545 (R. 81) "retroactively" finding that the construction of the sewer lines was necessary and should be made, that the petitions of the property owners at the time of the letting of the contract were "legally sufficient" and were signed by the owners of at least one-half in value of the property to be specially benefited, and that the council "hereby decides that two-thirds of the cost of the sewer improvements herein mentioned shall be assessed against the real property so specially benefited". (R. 81, 82, 83, 84, 85.) Although Resolution 545 referred to prior "resolves" of the City Council and implied that the City Council had taken some ac-

tion prior to March 1, 1950, "and prior to the commencement of construction", the whole minutes of the proceedings of the City Council were introduced and no "prior resolves" appeared. (R. 14-45, 98-125.) Subsequent to the enactment of Resolution 545, and by virtue of Resolution 570 (R. 85) and Resolution 577 (R. 88), the appellant imposed a special assessment lien on appellees' property on the ground that it was specially benefited by the sewer line improvement. The appellees instituted the present action, and subsequently made a motion for summary judgment (R. 10) *and appellant made a like motion for summary judgment stating that "the record states the full facts".* (R. 143, 144.) On January 29, 1951, the court granted appellees' motion for summary judgment. (R. 135.)

ARGUMENT.

I.

Appellant, City of Anchorage, in order to impose a valid assessment on appellees' property was required, prior to letting the contract or beginning construction of the sewer, to determine by formal action: whether the sewer improvement was necessary and should be made; whether the request for the improvement was signed by all the owners of at least one-half in value of the property specially benefited, and whether the cost of improvement should be paid by special assessment.

The law in Alaska requiring municipalities to take formal action by their councils, *prior* to contracting for or constructing the improvement, if it is intended to assess the cost of the improvement against the benefited land owners, is set forth in the case of *In Re Ketchikan Delinquent Tax Roll, City of Ketchikan v. Furnivall,* 293 Fed. 577 (C.C.A. 9th 1923), hereinafter referred to as the *Ketchikan* case. In the *Ketchikan* case, containing a fact situation almost identical with the facts here on appeal, the Circuit Court of Appeals said:

> "On the 5th day of October 1920, a petition was presented to the common council of the City of Ketchikan, praying for the construction of a certain roadway and sidewalk and the establishment of a right of way therefor; the petitioners agreeing to pay their proportionate share of two-thirds of the costs of improvement and that the same be a specific lien upon their respective properties abutting on the improvement. The petition was approved and ordered filed upon presentation to the city council, and the city clerk was directed to call for bids for the work at the next regular meeting. So far as the record discloses no other or further action was taken by the city council until a resolution was adopted on February 2, 1921 assessing two-thirds of the costs of the improvements against certain persons and the lands owned or occupied by them, and declaring the sums so assessed a specific lien upon the lands. On May 20, 1922 the delinquent tax roll for the city for the year 1921 was presented to the court under the provisions of Chapter 69 of the Session Laws of Alaska of 1913, for adjustment and or-

der of sale of the property therein described. At the same time there was presented the delinquent assessment roll for the improvement in question. The appellee, Furnivall, filed objections to the assessment and order of sale and after hearing before the court the objections were sustained. From that order the present appeal is prosecuted.

"In the course of its opinion the court below said: 'It being clearly shown that two-thirds of the property owners abutting on the proposed Harris Street extension had not petitioned therefor, this is jurisdictional and as to the non-consenting owners, the whole proceedings are illegal.' But the court made no further finding on that issue. The court further held, however, that inasmuch as the improvement and assessment against the abutting property was not provided by ordinance or resolution, the whole proceeding was void, and on this latter ground we are of opinion that the judgment of the court should be affirmed. The power to locate, construct and maintain streets, and more especially the power to impose a tax upon abutting property owners is a legislative one, and can only be exercised by ordinance or resolution. 28 Cyc. 992: Chicago & N.P.R. Co. v. City of Chicago, 174 Ill. 439, 51 N.E. 596; Eckert v. Town of Walnut, 117 Iowa 106, 91 N.W. 929; Zalesky v. Cedar Rapids, 118 Iowa 714, 92 N.W. 657, McQuillans Municipal Corporations p. 1334. Furthermore, under the Alaska Statute, the discretion to levy upon abutting property to pay two-thirds of the cost of an improvement must be exercised when the petition for improvement is heard, and before, or at the time the improvement is ordered. Most assuredly

one city council cannot make an improvement, and some other city council at some later day excercise the discretion to impose a part of the burden upon abutting property owners. The assessment is therefore void, and the judgment is affirmed."

The rule set forth in the *Ketchikan* case, is set forth more completely in the lower court opinion of Judge Reed wherein he said:

"There is no showing that an ordinance or resolution was passed by the city council, either by the minutes of the council or by the oral testimony submitted at the hearing. A discretion is given the city council to determine whether the cost of a public improvement shall be borne wholly by the city at large or two-thirds thereof by the abutting property. At the time the improvement is decided upon by the council, it should also determine how the cost thereof should be borne. If this is not done, the whole proceeding would be left to the decision of a city council after the work is finished, without opportunity for owners to protest or object.

As is said in Eckert v. Town of Walnut, supra:

> 'If no ordinance or resolution were required in such cases (altering or establishing grades of streets) the owner of such property would be practically at the mercy of the everchanging personnel of the city or town government, and his property rights and values might be shifted at their own sweet will, because of his inability to show their unrecorded vagaries.'

The case at bar shows the necessity of an ordinance. No notice of the manner of the proposed

improvement was given to the objecting property owners; no opportunity to protest or object before the improvement was contracted for; an assessment was levied by a subsequent council without prior notice or any equalization or opportunity for the owners of property to be heard. The proceedings were irregular and cannot be sustained."

Reed J., *In re Ketchikan Delinquent Tax Roll* (1st Division, Ketchikan July 27, 1922) 6 Alaska 653, at 663.

It is worthy of comment that the *Ketchikan* case opinion was based upon Section 627 of the Compiled Laws of the Territory of Alaska, 1913, no longer in effect, which read as follows:

"That the said common council shall have and exercise the following powers: * * * Fourth. To provide for the location, construction and maintenance of the necessary streets, alleys, crossings, sidewalks, sewers and wharves. If such street, alley, sidewalk, or sewer, or parts thereof is located and constructed upon the petition of the owners of two-thirds in value of the property abutting upon and affected by such improvement, then two-thirds of the cost of the same may, in the discretion of the council, be collected by the assessment and levy of a tax against the abutting property, and such tax shall be a lien upon the same * * *"

Almost a year subsequent to the publication of the lower court opinion in the *Ketchikan* case, the legislature of the Territory of Alaska repealed Section 626,

and enacted Section 64, Chapter 97, Session Laws of Alaska 1923, which is now Section 16-1-82 of the Compiled Laws of Alaska. There may have been some question whether the former Section 627 made it mandatory that Alaskan municipalities take formal action by their councils, prior to contracting for or constructing the improvement, in order to assess the costs against benefited land owners; the lower court and the appellate court decided in the *Ketchikan* case that the language of Section 627 made such formal action necessary. The Legislature in repealing Section 627 and enacting Sections 64 and 65 Chapter 97, Session Laws of 1923, left no doubt of the mandatory nature of such prior, formal action. Section 64 reads:

> "Section 64. COUNCIL MUST DETERMINE NECESSITY OF IMPROVEMENTS AND SUFFICIENCY OF PETITION. When such request is presented to the council the same shall be filed and the council shall determine (1) whether the improvement requested is necessary and should be made, (2) whether the request is signed by all the owners of at least one-half in value of the property specially benefited by such improvement, and shall pass a resolution containing the council's findings on such questions, which findings shall be conclusive save and except that anyone who signs the name of another to such request without written power of attorney so to do or who shall procure, solicit, aid or abet or induce another to do so, shall be guilty of forgery and shall be punished accordingly."
>
> "Section 65. WHEN ASSESSMENT AUTHORIZED. If the council find that the im-

provement is necessary and that the request has been signed by the owners of at least one-half in value of the property to be specially benefited, the council may also decide that any part of the cost of such improvement, not, however, to exceed two-thirds thereof, shall be assessed against the real property so benefited in proportion to the amount of such benefits received, by each tract of property."

By the legislature's employment of the word "must" in the subtitle of Section 64 whereby the "Council must determine necessity of improvements and sufficiency of the petitions", it was made clear that certain preliminary action was made mandatory on the City Council. The fact that the word "must" appears in the title does not detract from its mandatory nature. These subtitles are expressive of the legislative intent and were declared to be, in *Earle v. Holman* (Sup. Ct. Oregon 1936), 61 P. (2d) 1242 at 1245:

> "a part of the enrolled bill as enacted by the Legislature. They are as much a part of the act itself as anything else contained in it and are to be resorted to in case of ambiguity or doubt as to the legislative intent. These subtitles and subheads as found in the act passed by the Legislature are not to be confused with the subtitles and explanatory headings in any codification of Oregon statutes. In so far as the explanatory headings in the Code are not found in the original session laws, they are no part of the statutes themselves and were merely inserted by the Code publishers for convenience in reference."

The legislature, in enacting Section 64, was precise in laying down and enumerating the conditions precedent to the levy of a valid assessment. It required under Sections 64 and 65, that:

(a) the petition be presented to the council and filed with it.

(b) that the council thereupon determine whether the improvement "requested" is necessary and "should be made" (the use of the word "should" indicates that it was never contemplated that the improvement would be authorized and constructed before the council made its determination).

(c) the council determined whether the request is signed by all the owners of at least one-half in value of the property specially benefited by such improvement.

(d) the council shall thereupon pass a resolution containing the above findings.

(e) "if" the council makes all the above findings, it may also decide, at that time, that an assessment may be made (the clause contained in Section 65 declaring that "the council may also decide" indicates that the prior findings are mandatory and are conditions precedent to the decision to assess).

The appellant, City of Anchorage, on the record, has made the following preliminary compliances with the statute:

(a) Petitions were "presented" to the Council (R. 93), with the fair probability that they did not remain "filed" because they were being circulated and signed after the sewer construction contract was let. (R. 96.) No other action was taken by the council except to let the sewer construction contract. (R. 62.)

(b) The council, prior to letting the contract, never determined whether the improvement "requested" was necessary and should be made. The whole record of the minutes of the council is bare. There was no determination.

(c) The council, prior to letting the contract, never determined whether the request was signed by all the owners of at least one-half in value of the property specially benefited by such improvement. The whole record of the minutes of the council is bare. There was no determination.

(d) The council, prior to the letting of the contract, did not pass a resolution containing the above findings. The whole record of the minutes of the council is bare. There was no resolution.

(e) The council, prior to letting the contract, never decided to make an assessment.

Stress is placed on the absence in the record of the minutes of the meetings of the city council of any action taken by appellant. That record is the only competent evidence of appellant's legislative actions. 5 McQuillin's Municipal Corporations (3rd Ed.) pp.

16, 17, 18, 19. The most that appellant, on appeal, can suggest to show conformity with the statute is that "petitions were circulated and signatures obtained of a majority in number of the property owners" (R. 127) and "were before the council when the work was authorized". (R. 128.) "Nothing in the minutes of the council indicates that any action was taken on the petitions or with respect to them at that time. It was not until March 2, 1950 that a resolution was passed in conformity with the requirements of Section 16-1-82, finding the petition sufficient and the improvements necessary." (R. 128.) In fact, a review of the minutes indicates that the minutes contain no record of the existence of the petition at that time. Only the affidavits of City employees establish the fact of the petition's existence. (R. 92, 95, 96.)

The appellant by implication in its argument suggests that the trial court and the Appellate Court should be impressed by the irrelevant election returns pursuant to Ordinance 193 (R. 67) which only authorized a bond issue but which did not compel the levy of a special assessment for the sewer improvement. The point is unworthy of argument.

Appellant argues that the "construction" placed by the City Council on the assessment statute (Appellants' Brief, page 18) should be favored by the courts; but in fact, there was and is no evidence of a prior "construction" of the city council before the trial court or before the Appellate Court on appeal. The "construction" which appellant insists upon is

that the City Council had authority to cure retroactively or retrospectively the attempted levy of assessment by the passage of Resolution 545. This "construction" of appellant runs counter to the general law concerning retrospective or retroactive legislation respecting special assessments. McQuillin declares:

> "Law must authorize improvements when made. To justify the levy of an assessment against land to pay for local improvements there must be in existence, at the time the improvement is made, a valid law authorizing the same. A law subsequently passed cannot be made restrospectively to authorize the assessment. This is the general rule usually enforced."
>
> 14 McQuillin, Municipal Corporations (3rd Ed.), P. 60, § 38.08.

This rule accords with the weight of authority set forth in American Jurisprudence:

> "Under a provision common to many improvement acts that before proceedings may be commenced there must be passed by the common council of the city a resolution of necessity, it is held generally that the declaration of necessity for the improvement is a distinct act from, and precedes, the order that the improvement shall be made. It is the commencement of the proceeding, and it is indispensable to give the council jurisdiction as is process or the voluntary appearance of parties in civil actions to give jurisdiction to a court. It is the first of several steps, which, if duly and regularly taken, may result in fixing a lien upon the property of the citizen,

and even in depriving him of it against his will. Therefore, if this step is not taken, the whole proceeding is a nullity."

48 *Am. Jur.* p. 683—"Special or Local Assessments".

This is the rule adopted by inference in the *Ketchikan* case. Thus Judge Bishop declared in *Zalesky v. City of Cedar Rapids et al.* (Supreme Court of Iowa, Dec. 17, 1902), 118 Iowa 714, 92 N.W. 657, at 660 (cited with approval in *In re Ketchikan Delinquent Tax Roll* (C.C.A. 9th), supra):

"The appellants contend that, even conceding the defects to which attention has been called, the same were cured, and a valid levy of assessment accomplished, by virtue of the resolution of February 15, 1901, and the notice served pursuant thereto. [Resolution read in part: 'Whereas, by reason of the omission of certain words doubts arise as to the sufficiency of the resolution heretofore passed ordering a permanent cement sidewalk, built on that part of Eighth Street and Ninth Avenue abutting upon and laying along the front and side of lot five. * * * Be it therefore resolved by the City Council * * * that the said sidewalk as above described be and is hereby reordered.'] and the further resolution of March 8, 1901, [Resolution read in part: 'Be it resolved by the City Council * * * that the assessment to W. Zalesky for the building of a permanent sidewalk * * * made on November 16, 1900, be and the same is hereby confirmed, and there is hereby reassessed against said property for the building of said sidewalk the said sum of $117.91, this

assessment to relate back and stand as of the date of the original assessment.']

Section 836 of the Code is relied upon as a basis for such contention. Granting even that the chapter of the Code of which said section is a part has application to the matter of construction of sidewalks,—a point we do not decide—still there is no merit in the contention of appellants. The defects which may be cured by a relevy of assessment are such only as inhere in the time or manner of the proceeding, the machinery of the law having once been properly put in motion. It was not intended that jurisdictional defects can be cured by proceeding as therein directed. Under the ordinance in question, the adoption of a resolution is a prerequisite to any further step being taken. Without that step there is no authority whatever to further proceed. The case is altogether different from one where, having authority to proceed, irregularities and defects in the subsequent proceedings thereafter occur, which do not have the effect to take away or impair any substantial right of a party interested. While having reference to a different section of the statute, yet the principle announced in the City of Chariton v. Holliday, 60 Iowa 391, 14 N.W. 775 is applicable. That was the case in which recovery was sought under the provisions of Section 479, Code 1873, which provides in effect that under certain specified conditions a recovery may be permitted for public improvements, notwithstanding informality, irregularity or defects in the proceedings under which such improvements were made. In the course of the opinion it is said: 'The irregularity or defect under which this sec-

> tion can be disregarded must, we think be a mere error or omission to do something which in no manner affects the jurisdiction of the city. It is fundamental that, unless jurisdiction has been acquired, the proceedings of all courts are void, and this must be so as to municipal corporations.' " Parenthical matter supplied.

If the City Council of the City of Anchorage did have power to validate retroactively a non-existent proceeding, it might have validated a petition which had become outdated and inexpressive of the property owners' desires. Thus in *Vennum v. Village of Milford,* 202 Ill. 423, 66 N.E. 1040 (1903) a petition for a street improvement in a village of less than 10,000 inhabitants, signed by one-half of the abutting owners and a majority of the resident property owners affected, was filed June 23rd and an ordinance passed authorizing the improvement. On August 11th the county court, in a proceeding to confirm the assessment, declared that the ordinance was invalid. So, on September 26th the original petition was refiled. Held, that the petition could not confer authority on the board of local improvements to adopt another ordinance, as the ownership of the property affected may have materially changed. The court stated at page 1041:

> "A petition which had the requisite number of qualified petitioners in June 1902 may or may not have contained the names of the requisite number of persons who were residents of the village and owners of property abutting on or to be affected by the improvement in September of

that year. After the adoption of the ordinance which was found to be invalid, and after the petition of the city for a judgment confirming a special tax under such ordinance had been denied, and the petition of the village dismissed, the petition of the property holders which was the basis of the invalid ordinance has no further life or vitality. It could not confer authority on the board of local improvements to proceed to the adoption of another ordinance in the month of September 1902."

II.

The trial court properly granted the motion for summary judgment because there were no issues of fact to be determined.

The judgment in this cause resulted from appellee's motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure and appellant's like motion for summary judgment made at the conclusion of the argument. (R. 125.) The appellant has stipulated that its attorney did declare in open court that:

> "I have checked the law and find that, unlike the old procedure where both parties moved for judgment on the pleadings, now under Rule 56 the Court has some discretion under the summary judgment rule. I know now that plaintiffs had actual legal notice and the record states the full facts; therefore defendant City moves now for summary judgment in its favor on the pleadings in this case according to Rule 56." (R. 143.)

If the record states the full facts, then no further facts were available, and on those facts the trial court was compelled to apply the law because the only *issue* remaining was the question of law. Where the full facts are before the court, summary judgment lies. The principle was recently restated in *United States v. Dollar,* 100 F. Supp. 881 (D.C., N.D., Cal., S.D., 1951) at 885:

> "In response to this showing the Government has done nothing. It has presented no opposing affidavits, no depositions or counter admissions. Although in oral argument it hinted at some 'other evidence', it failed to produce it in response to the motion. Obviously, the whole purpose of the summary judgment procedure would be defeated if a case could be forced to trial by merely contending that an issue exists, without any showing of evidence."

Counsel for appellant has stipulated that the full facts were before the trial court. (R. 143, 144.) The facts before the trial court were, as stated in plaintiffs affidavits in support of their motion for summary judgment that:

(a) Plaintiffs were never aware of any legal invalidity in the sewer assessment proceedings until after the sewer construction was completed. (R. 11, 13.)

(b) Plaintiffs were never aware that a special assessment was to be levied for the construction of sewers. (R. 11, 13.)

Appellants in their answering affidavits never denied or repudiated these assertions by plaintiffs but

merely declared that "whatever protest was made by the Ashleys failed to specify any reason why the assessment was claimed void." (R. 46, 47, 48.) (But see R. 33, 36.)

Appellant in its brief declares "that the appellees *were on notice* of the special assessment to be levied is outlined on pages 67 to 71 of the transcript" (Appellant's Brief page 28); the contention being that Ordinance No. 183 gave *notice* to the appellees because it would authorize the appellant city to issue General Obligation Bonds and to "pledge the proceeds of any special assessments *which the City may by law assess and collect*" to secure payment of said bonds. (Emphasis supplied.) (R. 68.)

Even conceding, for the purposes of argument, that the election was "notice" to the appellees and conceding, a fact not shown, that they were even present in the territory at the time of the election, the election could only give *notice* to the appellees that the city had authority under territorial law to levy a special assessment; the appellees may be said to have the same notice by virtue of the existence of Sections 16-1-81, 16-1-82, and 16-1-83, A.C.L.A. 1949. It suffices to say that neither the election nor the ordinance ever attempted to, did, or could, authorize a special assessment.

There is no evidence in the record indicating that the appellees at the time of the election were present or resident in the Territory of Alaska, and appellant produced nothing of evidentiary weight to indicate plaintiffs' knowledge.

Appellant cites the rule of estoppel of *Schmidt et al. v. Village of Deer Park,* 78 N.E. (2d) 72 (Ohio 1947), under which appellant has the obligation, in order to create an estoppel from silence merely, to prove that appellees had, not *notice,* but *knowledge* of *all* the following:

1. That the improvement was being made;

2. That it was intended to assess the cost thereof, or some part of it, upon their property;

3. That the infirmity or defect in the proceeding existed which they are to be estopped from asserting.

Appellant has introduced no evidence of the appellees' knowledge that it was intended to assess the cost of the improvement against appellees' property, except the alleged "notice" of election; appellant does not even argue that appellees knew of the infirmity or defect in the proceeding.

The rule of *Schmidt v. Village of Deer Park, supra,* is the law of Alaska. As stated in *In Re Ketchikan Delinquent Tax Roll,* 6 Alaska 653 (1922), at 667:

> "As to Shelton, Hendrickson and Groellinger being estopped a different question arises. Under the facts shown at the hearing, none of these parties were signers of the petition. There is no testimony that any of them participated in or encouraged the building of the sewer, or had any knowledge that their property was to be assessed for two-thirds of the cost of the improvement thereof. It is argued by counsel for the city that they are estopped to raise any question because

of their silence in permitting the work to proceed without raising any question as to the irregularity of the proceedings. I am unable to concur in this view of the law. The rule laid by the authorities as to estoppel by silence is thus summed up in Tone v. Columbus, 39 Ohio St. 303, 48 Am. Rep. 438, which case is cited with approval by the Supreme Court in several leading cases:

'When the improvement is of a public street upon which the owner's property abuts, before the duty to speak can be said to exist, which is so imperative that if he keeps silent then, he shall not afterwards be heard, it must be shown:

First: That he knew the improvement was being made. * * *

Second: That he had knowledge that the public authorities intended, and were making the improvement upon the faith, that the cost thereof was to be paid by the abutting property owners, and that an assessment for that purpose was contemplated. * * * Because cities may improve the public streets out of the general fund and without a special assessment.

Third: That he knew of the infirmity or defect in the proceedings under which the improvement was being made, which would render such assessment invalid and which he is to be estopped from asserting.

"At least, in the absence of any evidence of previous knowledge on his part of their unlawful action, he is in time with his protest, when they proceed to deprive him of his rights under such proceedings. * * *"

> *Fourth:* Some special benefit must have accrued to the owner's property distinct from the benefits enjoyed by the citizens generally.'

In the case at bar no opportunity was afforded these objectors prior to the assessment to protest against the work, no notice was given them that their property would be assessed for any part of the cost of the improvement. There is no showing by the city in the testimony that they had knowledge that the city contemplated assessing the cost of the improvement against the abutting property and there is no showing that they had any knowledge of the defect in the proceedings. They have therefore the right—to object and insist upon any defect in the proceedings anterior to the assessment itself because of no ordinance or resolution providing for the improvement and assessment of the abutting property, which I deem necessary as an initiatory step under Section 628 of the Compiled Laws."

As stated by Williams J. in the leading American case of *City of Moundsville v. Yost et al.,* 75 W.Va. 250, 83 S.E. 910 (1914), at p. 912:

> "The bill alleges that notice was given to Mary A. Seamon, the then owner of the lot to appear and show cause, if any she could, why the assessment should not be made for the street improvement; that she failed to appear and to object thereto; and that therefore the defendants are now estopped to object to the legality of the assessment. It may be that, if the objection related only to a mere irregularity in the proceeding, the present owner would be estopped by the failure of his predecessor in title to make objection before the

assessment was made. But the objection relates to more than a mere irregularity. It strikes at the jurisdiction of the council to proceed in violation of the mandate of its charter, and involves the very right and power of the city to make a binding special assessment in a manner different from the only method provided by the statute. The right to make local assessments depends upon legislative grant of power which in this case is given. But the power must be exercised in the particular mode prescribed by the statute. The void resolution is the only basis for the illegal special assessment, and the invalidity of the resolution renders void all subsequent proceedings, so far as they relate to the rights of property owners. Hence the defendant E. H. Yost is not estopped to deny the validity of the lien. No one is estopped to assail collaterally proceedings which are wholly void. People ex rel. Kochersperger v. Hurford, 167 Ill. 226, 47 N.E. 368; Strout v. City of Portland, 26 Or. 295, 38 Pac. 126; Jorgenson v. City of Superior, 111 Wis. 561, 87 N.W. 565; Coggeshall v. City of Des Moines, 78 Iowa 235, 41 N.W. 617, 42 N.W. 650; Starr v. City of Burlington, 45 Iowa 87; Bradley v. City of Centerville, 139 Iowa 600, 117 N.W. 968; Fox v. Middlesborough Town Co., 96 Ky. 262, 28 S.W. 776; Verdin v. City of St. Louis, 131 Mo. 26, 33 S.W. 480, 36 S.W. 52; App v. Stockton, 61 N.J. Law 520, 39 Atl. 921; Burnett v. Boonton, 73 N.J. Law 453, 63 Atl. 995."

And this is the rule in Alaska as acquired from the decisions of the Oregon Courts and as stated by Judge

Moore in *Strout v. City of Portland,* 26 Or. 294, 38 Pac. 126 (1894), at p. 127:

> "An examination of the record discloses that the court was fully warranted in its conclusion that the common council had not acquired jurisdiction to make the improvement, and the only question presented by this appeal is whether the plaintiffs, one of whom signed the petition for the improvement, are estopped by their silence and apparent acquiescence from questioning the regularity of the proceedings. The assessment of property for a local improvement is always a proceeding in invitum, and rests upon the theory that the property of the citizen has been benefited to the extent of the amount assessed against it; but before such property can be charged with any part of the cost of the improvement the common council must, in the manner prescribed in the City Charter, acquire jurisdiction of the person and the subject matter; for, without it, the right to assess such property for benefits conferred does not exist, nor should it, as a grant of such power would make the common council not only the agent of the owner, but his guardian as well.
>
> But it is contended that the plaintiffs knowing that the improvement had been ordered should have informed the council of the irregularity in the proceedings, and, not having done so or made any objection to the improvement until it was completed, should now be estopped from taking advantage of these jurisdictional defects. The property owner is not the legal adviser of the common council, which usually has an attorney for this purpose. He is not required to interfere with the mode adopted to acquire jurisdiction, nor is he expected to object or protest after the

proper initiatory steps have been taken, except to the mode or manner of the improvement, or some intermediate order or proceeding of the common council which injuriously affects his property. Jurisdiction to improve a street is only obtained by the common council in the manner prescribed in the City Charter, and not by anything the property owner did or failed to do; and he is no more estopped from questioning the council's jurisdiction upon the facts than he would be from questioning the jurisdiction of a judicial tribunal which should attempt to deprive him of his property. Canfield v. Smith, 34 Wis. 381. Objection to the jurisdiction of the person may be waived by the parties interested, but want of jurisdiction of the subject matter is never thus waived. (Damp v. Town of Dane, 29 Wis. 432, In re Sharp, 56 N.Y. 257) nor is a party who undertakes to waive it estopped from afterwards questioning the validity of the proceedings (Ruhland v. Town of Hazel Green, 55 Wis. 664, 13 N.W. 887). While there is quite a conflict of opinion upon this subject, we think the trend of modern decisions, as well as the weight of authority and better reason, serves to establish the following rules as applicable thereto: (1) When, in proceedings for the levy of an assessment, the common council is without jurisdiction from the beginning, a person whose property is benefited by a local improvement is not estopped to deny the validity of the proceedings on the ground that he made no objection thereto while the improvement was in progress. Starr v. Burlington, 45 Iowa 87; Keese v. City of Denver, 10 Colo. 112, 15 Pac. 825; Coggeshall v. Des Moines, 78 Iowa 235, 41 N.W. 617, and 42 N.W. 650; *Stephens v.*

Daniels, 27 Ohio St. 527; *Kiphart v. Railway Co.* (Ind. App.) 34 N.E. 375; Fayssoux v. Succession of Baroness DeChaurand, 36 La. Ann. 547; Mulligan v. Smith, 59 Cal. 206. (2) But, if, after jurisdiction has been acquired the owner of property benefited by a local improvement, with knowledge of its progress, permitted its completion without objection, he will be estopped from questioning mere irregularities occurring in the subsequent proceedings. Elliot, Roads & S. 420; Wilson v. Salem, 24 Or. 504, 34 Pac. 9; Barkley v. Oregon City, 24 Or. 515, 33 Pac. 978. It follows from these rules that the plaintiffs who did not sign the petition are not estopped by their silence or apparent acquiescence while the improvement of said street was in progress from questioning the proceedings of the common council; and the plaintiff who petitioned the common council to improve the street did not thereby waive his right to have the proceedings conform to the mode prescribed in the charter. (McLauren v. Grand Forks, 6 Dak. 397, 43 N.W. 710; Howell v. Tacoma, 3 Wash. 711, 29 Pac. 447; Mayor etc. v. Porter, 18 Md. 300; Steckert v. East Saginaw, 22 Mich. 104; Tone v. Columbus, 39 Ohio St. 281; Taylor v. Burnap, 39 Mich. 739; In re Sharp, supra); and therefore he is not estopped to question them. His petition fairly construed meant that the common council should proceed to the improvement of the said street in the manner authorized by law, and he never consented to the improvements being made in any other mode. The common council not having acquired jurisdiction to make said improvement, the plaintiffs have a right to challenge the validity of its proceedings and it follows that the decree of the court below must be reversed."

Accord: *Town of Ketchikan v. Zimmerman,* 4 Alaska 336 (1911), at 345 (Citing *Strout* case, supra, with approval).

The appellant makes much of the "obligation" of appellees to make "objection" to the levy of special assessment; there is certainly no obligation set forth by Territorial statute. Provision for objections is made under Section 16-1-96, A.C.L.A. which reads:

> §16-1-96 "Time for objections to assessment. The regularity or validity of said assessment may not in any manner be contested or questioned by any proceeding whatsoever by any person not filing objections to such assessment roll prior to the same being confirmed." (L. 1927, ch. 56, §6, p. 99; C.L.A. 1933, §2466.)

But this statutory provision for objection applies and refers *only* to the *additional* method of sewer improvement assessment created by the Territorial Legislature in 1927. (§16-1-91, 16-1-92, 16-1-93, 16-1-94, 16-1-95 A.C.L.A. 1949, L. 1927, ch. 56.) There are no such mandatory statutory provisions under the statutory method of assessment which appellant tried to choose.

CONCLUSION.

It is submitted that the appellant's attempted levy of assessment is invalid and violates the general rule of statutory construction set forth in 14 McQuillin, Municipal Corporations (3rd Ed.), § 38.07, page 54:

> "Construction of Power: Power to make public improvements does not of itself confer the power

to levy and collect special taxes or assessments to defray the costs of such improvements. Moreover as a municipal corporation has no inherent power to levy and collect such charges, and as the exercise of such power is in derogation of the right of private property, the law involved should be strictly construed, in determining whether the power exists and in case of any fair and reasonable doubt, the doubt should be resolved against the existence of the power and the power denied. Thus, under charter authority to assess to "the owners of property" two-thirds of the cost of street improvements, an assessment of the two-thirds against abutting owners was held invalid.

The nature and extent of such power must be determined from the express grant, and municipal authorities must adhere strictly to its terms, for any material departure therefrom especially of a jurisdictional nature, is fatal to the validity of the assessment. This is to say that in levying special assessments or taxes due observance of all mandatory and jurisdictional provisions of the applicable law is indispensable. All limitations expressed or implied therein must be strictly observed. If the applicable law prescribes the mode of exercising the power, the mode prescribed must be followed, or the assessment will be void; and in this connection it should be mentioned that the passage of a valid ordinance or resolution declaring the necessity for or the intention to make the improvement is a condition precedent to the right to levy the assessment. It is jurisdictional."

This strict statutory construction is in accordance with public policy:

"In the construction of the grant of any power to tax made by the state to one of its municipal corporations, the rule accepted by virtually all the authorities is that it should be with strictness. A citizen cannot be subjected to the burden of taxation without clear warrant of law."

16 McQuillin, Municipal Corporations (3rd Ed.), § 44.13, p. 42.

"This is not only in accordance with the general rule that construes sovereign grants with strictness, it is also obviously wise. The mischief of a strict construction is easily obviated by the legislature; but the mischief of a liberal construction may be irremediable before it can be reached."

1 Cooley, on Taxation 469 (3rd Ed.).

In conclusion, if there were any "mischief" of a strict construction in the trial court's decision it was obviated by the Territorial legislature in 1951 by the passage of a reassessment statute (Ch. 99, Session Laws of Alaska, 1951).

For the foregoing reasons the judgment of the District Court should be sustained.

Dated, Anchorage, Alaska,
January 25, 1952.

Respectfully submitted,
GEORGE M. MCLAUGHLIN,
Attorney for Appellees.